Filed 7/13/20 P. v. Block CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. XAVIER EZEKIEL BLOCK, Defendant and Appellant.	C088555 (Super. Ct. No. 18F2913)

Defendant Xavier Ezekiel Block was charged on May 16, 2018, in criminal complaint No. 18-02913 with kidnapping and sexual assault felonies against R.W. On May 18, 2018, defendant was charged in criminal complaint No. 18-02982 with a sexual assault felony against C.L. The trial court subsequently granted the prosecution's motion to consolidate the two cases, over defendant's objection.

On appeal, defendant argues the trial court erred prejudicially in consolidating the two cases. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*),

defendant also argues the trial court erred in imposing certain fees, fines, and assessments without a hearing to determine his ability to pay them. We will modify the judgment to correct the trial court's failure to impose certain mandatory fees, fines and assessments that we found in our review of the record, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Consolidation Motion and Preliminary Hearings*

On May 23, 2018, the People filed a motion to consolidate the kidnapping and sexual assault case involving victim R.W. (case No. 18F2913) with the sexual assault case involving victim C.L. (case No. 18F2982) pursuant to Penal Code section 954.[1] The prosecution argued that consolidation was appropriate because the cases involved the same class of crimes, the evidence was cross-admissible, and defendant would suffer no undue prejudice. Resolution of the motion was deferred until after the preliminary hearings in both cases.

On June 7, 2018, the trial court held the preliminary hearing in case No. 18F2913 (the R.W. case). The prosecution called R.W., Chelsea M., Shasta County Sheriff's Deputy Tom Fleming, Shasta County District Attorney Investigator Kert Rulofson, and Shasta County Sheriff's Deputy Gerry Maul to testify about the assault and related events.

R.W. testified that in the early morning of May 13, 2018, she arranged for a ride from Cottonwood to Anderson with Jeffrey B., defendant, and another individual. At some point after getting into the vehicle, Jeffrey told R.W. that she was not going to get a ride to Anderson. R.W. exited the vehicle and defendant, whom she knew, offered to walk her to a store near his house to purchase cigarettes. While walking, R.W. counted her money. Shortly thereafter, defendant punched R.W. in the head, demanded the cash,

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[1] Undesignated statutory references are to the Penal Code.

and began choking her to the point that she could not breathe and thought she would die. She attempted to defend herself but eventually lost consciousness. When R.W. awoke, she realized she was off the road in some bushes without pants or shoes. After retrieving her pants, R.W. walked to the closest house and banged on the door; the residents called the police and R.W. was eventually taken to the hospital. R.W. did not have any injuries before the attack. After the attack, R.W. was scratched and bruised, her voice was hoarse, her vision was blurred in one eye for a couple of days, and she was dizzy for two weeks.

Chelsea, the mother of one of defendant's children, testified that defendant was staying in a car outside her residence and she saw him at approximately 5:00 a.m. on May 13. Defendant told her that he had been in a fight and she noticed blood on his face. Defendant gave evasive responses when questioned about the details of the altercation. Chelsea saw defendant remove his clothes and throw them in a garbage can. Shortly thereafter, defendant told Chelsea that he had washed himself off. Chelsea spoke to a sheriff's deputy later that day and gave him a jacket that defendant had been wearing.

Deputy Fleming testified that he searched the crime scene and observed disturbed earth, drag marks, and matted grass approximately 15 feet off the road. Deputy Maul interviewed Chelsea about the incident in question and she told him that she had seen a bloody jacket in defendant's car, and also saw blood on defendant's face, which he eventually washed off with a hose.

Investigator Rulofson has expertise in strangulation injuries and testified that he met with R.W. approximately two weeks after the attack. R.W. still had injuries and bruising on her neck and face. Rulofson testified that he had never seen strangulation injuries as bad as those suffered by R.W. and opined that she was lucky to be alive. When Rulofson asked R.W. whether she had been raped, she told Rulofson that she had been. When asked how she could be certain, R.W. told him, " 'You can feel it. You just know.' "

The defense called no witnesses. The trial court found the evidence sufficient and defendant was ordered held without bail.

On June 28, 2018, the trial court held the preliminary hearing in the C.L. case (case No. 18F2982). The prosecution called City of Anderson Police Officer Steve Blunk and private investigator Donald Luster as witnesses to testify about the assault on C.L. and related events. Defendant called C.L.'s roommate, Lacey Y.

Officer Blunk testified that he met with C.L. to discuss an event that occurred on the night of January 25, 2018, into the early morning of January 26, 2018. Blunk testified that C.L. had been drinking with friends, including Lacey, Jeffrey, and defendant. C.L. was in her bedroom, bent at the waist but standing, texting someone when defendant entered the bedroom. When defendant ask C.L. who she was texting, C.L. told him it was none of his business. Defendant then pushed her down onto the bed on her stomach and held her hands behind her back. C.L. attempted to yell for help, but defendant placed his hand over C.L.'s mouth and pulled down her pants and underwear. C.L. told defendant that she did not feel well and did not " 'want to do this now.' " Defendant told her, " 'You're just going to take this.' " She told him she was in pain as he inserted his penis into her vagina. C.L. lost consciousness at one point. After the assault, she left the bedroom and told Lacey and Jeffrey that she had been assaulted, while defendant entered the bathroom. C.L. eventually told Blunk that she was reluctant to move forward with the case because of harassment and social media comments from people who knew defendant. C.L. never changed her story, however, or told Blunk that the incident did not occur. After the incident, C.L. had a fight with Lacey and they were no longer roommates.

Lacey testified that she, C.L., defendant, and Jeffrey were drinking and using cocaine the evening of January 25. C.L. was "throwing herself on" defendant within an hour of his arrival and "wanting to go to the bedroom with him." C.L. eventually took defendant by the hand and led him into the bedroom. Lacey never heard anyone yell for

help. Defendant emerged from the bedroom and took a shower. C.L. then came out and told Lacey that she had had sex with defendant, but was acting fine. Lacey and C.L. went to a store and, upon their return 20 minutes later, C.L. expressed anger at defendant and told him to leave. Defendant complied and slept in Jeffrey's car. The next morning, C.L.'s boyfriend came to the apartment and got into an altercation with Jeffrey, leading to the police being called. Lacey was present when the police talked to C.L. and C.L. did not mention being raped.

Investigator Luster testified that Lacey had told him during an interview that C.L. had reported being held down and forced to have sex on the night of January 25. On cross-examination, Luster added that Lacey's story evolved during his interview and she also told him that C.L. was upset about the blood on the bed, and disappointed that defendant showered without her, and that defendant would not cuddle with her after sex.

The trial court found the evidence sufficient to hold defendant to answer for the rape of C.L.

On July 16, 2018, defendant filed written opposition to the motion for consolidation. Defendant acknowledged that the offenses were of the same class, but argued against joinder because he anticipated offering different defenses to the two cases, consent in the C.L. case and denial of sexual activity in the R.W. case.[2] Defendant further argued that cross-admissibility was not "a certainty" and that the C.L. case was a weak case being joined with the stronger R.W. case.

The consolidation motion was heard on August 6, 2018. The prosecutor noted that DNA evidence established defendant's sexual contact with R.W. Nevertheless, defendant argued the defenses in the two matters were "dramatically different." The trial court granted the motion after finding that the two cases involved the same class of crime,

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[2] By the time of trial, defendant's strategy shifted and he argued consent in both cases.

i.e., forcible rape. The court also found that the crimes occurred within a close period of time and the facts alleged were not vastly different from each other. The court found no danger of undue prejudice. The court observed that R.W. was "injured a little bit worse" but neither case was found to be "more inflammatory than the other." The court also did not find one case to be particularly stronger than the other based on the evidence known at the time of the hearing. The court also observed that it was "possible, if not probable," that Evidence Code section 1108 would make the evidence cross-admissible in the event of separate trials.

B. *Charges*

A first amended consolidated information was filed on October 3, 2018. Defendant was charged with kidnap to commit rape (§ 209, subd. (b)(1); count 1); kidnap to commit robbery (§ 209, subd. (b)(1); count 2); assault with intent to commit rape (§ 220; count 3); forcible rape (§ 261, subd. (a)(2); counts 4 & 6); and assault with force likely to cause great bodily injury (§ 245, subd. (a)(4); count 5). Counts 1 through 5 pertained to the alleged assault on R.W. on May 13, 2018, and count 6 pertained to the alleged assault upon C.L. on January 25, 2018.

Counts 1, 4, and 6 were enhanced with allegations that defendant committed sex crimes against multiple victims. (§ 667.61, subd. (e)(4).) Counts 1, 2, 3, and 5 were enhanced with allegations that defendant personally inflicted great bodily injury upon R.W. (§ 12022.7.) Counts 1, 3, and 4 were enhanced with allegations that defendant inflicted great bodily injury upon R.W. during a sex offense. (§ 12022.8.) The information also alleged that defendant increased the risk of harm during the kidnapping in count 4 within the meaning of section 667.61, subdivisions (a), (d), and (e).

On October 3, 2018, defendant pleaded not guilty and denied the enhancement allegations.

C. *Trial Evidence*

1. *The first crime (rape of C.L.)*

a. *Prosecution evidence*

C.L. testified that she lived with Lacey and was acquainted with defendant. On January 25, 2018, she and Lacey invited defendant and Jeffrey to their apartment. The four of them had spent the prior evening together. C.L. and defendant eventually went into the bedroom to get away from Jeffrey and Lacey, who were having sex on the couch. C.L. testified that there was no romance or flirtation with defendant. She was looking at social media when defendant questioned why she was on her phone and tried to grab the device. She told defendant to get away from her and said that he was not her boyfriend. Defendant then pushed her over and said, " '[Y]ou're going to give me my money's worth.' " Defendant held C.L.'s hands behind her back with one hand, and used the other hand to pull down her pants and bend her over the bed. He then put his penis in her vagina. C.L. told defendant she was bleeding. At one point, defendant put a lighter in her vagina. Defendant also choked her into unconsciousness with one hand. When defendant was finished, C.L. went out into the living room and told Jeffrey and Lacey what had happened. They were intoxicated and did not believe her. C.L. then left the apartment and returned about 20 minutes later. Defendant was still there and she asked him to leave. C.L. called Stephan P. the next morning and told him what happened. Stephan came over to the apartment and got into an altercation with Jeffrey that resulted in the police being called. C.L. did not report the rape to responding officers, but later called 911,[3] and was driven by Stephan to the hospital for an exam; Stephan did not believe that she had been raped.

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[3] The 911 call was played for the jury. In the call, C.L. stated she was raped by defendant the night before and there was "blood everywhere."

A "sexual assault nurse" who examined C.L. on January 26, 2018, testified that C.L. complained of vaginal pain and bleeding. She said her neck had been held down, and the nurse noticed a slight discoloration on her neck. C.L. also said a penis had been inserted in her vagina multiple times. The nurse observed injuries in C.L.'s vaginal area, and her voice was hoarse.

Jeffrey lived near defendant for 17 years and was a close friend. In January 2018, Jeffrey and defendant spent two consecutive nights with Lacey and C.L. On the first night, he heard defendant and C.L. having sex in the bedroom, and heard C.L. say, "[F]uck me." C.L. was flirting with defendant in the living room after they had sex. On the second night, C.L. and defendant were flirting again, and went into the bedroom. Jeffrey again heard "a lot of sexual activity" and heard C.L. saying, "[F]uck me, fuck me, I'm a dirty little slut. I'm a whore." Defendant went to shower. C.L. emerged from her room and was a "little upset," and she and Lacey went to the store. When they returned, C.L. told defendant to leave. C.L. said defendant touched her "in a weird way." Jeffrey also suggested that defendant leave, and he did. Jeffrey saw Stephan the next morning. Stephan was angry and the police were called to the house.

b. *Defense evidence*

Shanice K. testified that defendant was the father of her son, and that she did C.L.'s hair on occasion. Shanice called C.L. sometime between February and March of 2018. C.L. told her that she and Lacey had invited Jeffrey and defendant over to their apartment to "hook up." C.L.'s boyfriend Stephan found out about it. Shanice testified that C.L. "freaked out" and said defendant raped her, but felt bad because it was untrue.

Defendant testified the first night he went to C.L.'s and Lacey's apartment with Jeffrey, they drank and smoked marijuana. He knew C.L. from high school. They were flirting in the apartment and went into C.L.'s bedroom. They were both intoxicated and had consensual sex. They took a shower together and defendant left about 4:00 a.m. the next morning. Defendant and Jeffrey went over again the next night, around 7:00 or

8:00 p.m. Defendant and Jeffrey brought liquor. Defendant went with C.L. into her bedroom to snort cocaine. He again had consensual intercourse with C.L. After about 20 minutes, C.L. began bleeding. C.L. said she was okay, but defendant was "grossed out" and went to shower. C.L. got a "little upset" after he put his clothes back on and closed the bathroom door in her face. After returning from a trip to the store, C.L. told defendant, " '[Y]ou know what you did to me,' " and, " '[Y]ou need to leave right now.' "

2. *The second crime (kidnap, rape, assault, and robbery of R.W.)*

a. *Prosecution evidence*

R.W. testified that in the early morning of May 13, 2018, she was picked up in Cottonwood by a vehicle occupied by defendant, Jeffrey, and Jonathan A. R.W. was acquainted with Jeffrey and defendant. R.W. thought the men would give her a ride to Anderson, but after stopping at a park in the Cottonwood area, and then at a residence, she was told there would be no ride. Defendant and R.W. exited the vehicle and walked toward defendant's house, ostensibly to find a store where she could purchase cigarettes. R.W. denied flirting with defendant and denied physical contact with him.

While R.W. and defendant were discussing the cigarette purchase, defendant struck R.W. hard enough to knock her down. R.W. remembered being on the ground and being choked into unconsciousness. She awoke in a different location off the road. R.W. noticed that her pants and shoes were gone. She found her pants about 10 feet away from where she regained consciousness. R.W. also realized that her face was "smashed up" and her eye was swollen shut and that she had abrasions on her back. She had leaves and dirt in her vaginal area. These injuries were not present before the attack.

R.W. went to a nearby house and knocked on the door. She then discovered that she was missing some cash. The residents called the police. Deputy Maul responded and observed R.W.'s injuries and postassault state. R.W. was taken to the hospital and told hospital staff what defendant had done to her before she lost consciousness.

Deputy Fleming searched the rape crime scene. He found a place in a wooded area where the ground appeared disturbed and observed what appeared to be drag marks on the ground. There also was an area where the vegetation was matted down. Fleming found a pair of black flip-flops about 45 feet from the matted area. Investigator Rulofson met with R.W. three days after the assault, and observed extreme injuries to her face and neck. R.W. also had abrasion injuries to her back. Rulofson qualified as an expert in strangulation. R.W.'s headaches and dizziness after the assault were consistent with a strangulation injury. The injuries to her neck also suggested strangulation. He opined that R.W. was lucky to be alive given the extent of her injuries.

An emergency room nurse who performed a sexual assault examination on R.W. on May 13, 2018, testified that she observed debris in R.W.'s hair and injuries to her face. One of R.W.'s eyes was swollen shut and there was a bite injury to her tongue. R.W. also had abrasions to her lower back area and debris in her vaginal area. A second nurse who examined R.W. three days later also observed vaginal injuries, including tears and abrasions.

A senior criminalist at the California Department of Justice analyzed DNA swabs from R.W.'s rape kit. She testified that the results showed the presence of sperm, that defendant could not be excluded as the donor, and that the odds of a random person being the contributor were in the quintillions.

Jonathan confirmed that he drove during a night on the town with defendant and Jeffrey on May 12, 2018. In the early morning hours of May 13, Jonathan drove the trio to pick up R.W. Jonathan grew tired by 5:00 a.m., so he drove to the apartment complex in Cottonwood where Jeffrey lived, and where Jonathan also lived in a different apartment with his sister. Jonathan thought he heard flirting between defendant and R.W. After parking at Jeffrey's apartment, Jonathan left to go home. When Jonathan left the group, R.W.'s face was uninjured.

Jeffrey testified that he had been close friends with defendant for 17 years. Jeffrey testified that he and defendant celebrated Jonathan's birthday together in May 2018. Jonathan, the designated sober driver, took them bar hopping in Jeffrey's car. They later picked up R.W. Jeffrey had agreed with R.W. over social media that they could give her a ride from Cottonwood to Anderson. R.W. rode in the backseat with defendant and Jeffrey thought they were getting along well. When Jonathan became tired, he drove back to the apartment complex where he and Jeffrey lived. Jeffrey went toward his apartment, and R.W. and defendant walked towards defendant's residence.

Chelsea testified that in May 2018, defendant was living in a vehicle outside the house where she was staying with defendant's brother. Chelsea spoke with defendant in the early morning hours of May 13, 2018. Defendant was acting strange. Defendant stated that he had been in some kind of altercation. It looked to Chelsea like defendant had blood on his face. Defendant was reluctant to provide details. Defendant changed his clothing and threw the clothing he had been wearing in the garbage. Chelsea told Shasta County Sheriff's officers that she saw defendant wash blood off of his face with a hose. According to Chelsea, at the time, defendant "had blood all over his face and his hands."

b. *Defense evidence*

Defendant testified that he and R.W. had intercourse about four years before the incident in May 2018. In the early morning of May 13, 2018, defendant, Jeffrey, and Jonathan picked up R.W. Defendant testified he was "pretty drunk" and flirted with R.W. They stopped at a park where Jeffrey, defendant, and R.W. smoked marijuana. The group then went to a residential area near Jonathan's house. Jonathan left and Jeffrey went into his house. Defendant and R.W. walked towards defendant's house. R.W. wanted to go to a store with Wi-Fi, and wanted to buy cigarettes. Defendant asked her, " '[C]an we be like old times,' " referring to their prior sexual relationship. R.W. said, " 'Oh, yeah,' " and they walked off the road into the bushes and she pulled her pants

down. Defendant did not drag her anywhere. They had sex, after which defendant's wallet and phone fell out of R.W.'s pocket. Defendant said, " 'Bitch, you stolen [*sic*] my shit.' " R.W. pulled out a knife and defendant punched her and "choked her out." He then grabbed the knife and ran. Defendant called Chelsea from outside her house and had her come out and smoke a cigarette. She asked what was on his face; defendant gave evasive answers. Defendant washed off the blood that was on him. He changed his clothes, and put the knife and his clothes and jacket in a trash can and fell asleep in his car.

D. *Verdicts and Sentencing*

On October 24, 2018, the jury found defendant guilty of the lesser included offense for count 2 of kidnapping and the enhancement, as well as all of the crimes and enhancements associated with counts 1 and 3 through 5. The jury deadlocked on the count 6 charge involving C.L., and the trial court declared a mistrial as to that count.

On November 26, 2018, the trial court sentenced defendant to state prison for an aggregate term of 30 years to life.[4] The court imposed a $10,000 restitution fine (§ 1202.4, subd. (b)) and a corresponding $10,000 parole revocation fine (§ 1202.45). Despite defendant being convicted on five counts, the court only imposed a $40 court operations assessment (§ 1465.8, subd. (a)(1)), a $30 court facilities assessment (Gov. Code, § 70373). The trial court also imposed a $300 penalty assessment (§ 1464), a $300 sex offender fine (§ 290.3), a $30 DNA penalty assessment (Gov. Code, § 76104.6), a $120 DNA penalty assessment (Gov. Code, § 76104.7), a $150 state court facilities construction fund penalty assessment (Gov. Code, § 70372, subd. (a)(1)), a $210 county penalty assessment (Gov. Code, § 76000, subd. (a)(1)), and a $60 state surcharge

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[4] The record is hereby augmented to include the abstract of judgment detailing the determinate portion of defendant's sentence, filed January 2, 2020.

(§ 1465.7). The abstract of judgment that details the indeterminate portion of defendant's sentence fails to include the term imposed on count 1.

DISCUSSION

I

Joinder of the Sexual Assault Charges

Defendant contends the trial court abused its discretion when it granted the prosecution's motion to consolidate the case involving the kidnap, rape, assault, and robbery of R.W. (case No. 18F2913) with the case involving the rape of C.L. (case No. 18F2982). He further alleges that joinder resulted in "gross unfairness" at trial amounting to a denial of due process. We disagree with both assertions.

A. *Applicable Legal Principles*

Section 954 provides in relevant part: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

The law prefers consolidation or joinder of charges. (*People v. Hartsch* (2010) 49 Cal.4th 472, 493.) Because it is undisputed that the offenses charged in this case are of the same class, joinder was proper under section 954. (See *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1112 ["[s]ex offenses 'belong to the same class of crimes' "].) Thus, "defendant can only predicate error in the denial of severance on a clear showing of potential prejudice. [Citations.] We review the trial court's denial of defendant's severance motion for an abuse of discretion." (*People v. Stanley* (2006) 39 Cal.4th 913, 934.) "In reviewing for abuse of discretion, we do not consider evidence that came out during the trial. Rather, a reviewing court's determination of whether a trial court has abused its discretion in denying severance must be based upon the facts before the court

at the time of the ruling. [Citations.]" (*People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1433 (*Ybarra*).)

" 'The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial.' [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173; *People v. Vines* (2011) 51 Cal.4th 830, 855, overruled on another point in *People v. Hardy* (2018) 5 Cal.5th 56, 103-104.)

If a court determines that no abuse of discretion occurred in the joinder of the charges, the reviewing court then asks if the defendant has shown that the resulting trial involved "gross unfairness" amounting to a violation of due process. (*Ybarra*, *supra*, 245 Cal.App.4th at p. 1434.) "In determining whether there was such gross unfairness, we view the case as it was tried, including a review of the evidence actually introduced in the trial. [Citation.]" (*Ibid*.)

B. *Abuse of Discretion Contention*

As a preliminary matter, we note that this is not a death penalty case, thus the fourth criterion is inapplicable.

Turning to the first criterion, cross-admissibility, defendant argues that evidence of the two crimes would not be cross-admissible under sections 1101 or 1108 of the Evidence Code. According to defendant, the evidence of the incident with C.L. "strongly suggested a consensual sexual encounter as well as serious concerns with the veracity of

C.L.'s story," and therefore "would not be cross-admissible to show propensity in the case involving R.W." We disagree with defendant's analysis. Had defendant been subject to separate trials, each would have involved accusations of a sexual offense. Under such circumstances, evidence of the defendant's commission of another sexual offense is admissible under Evidence Code section 1108 so long as it is not inadmissible pursuant to Evidence Code section 352. (See *People v. Hernandez* (2011) 200 Cal.App.4th 953, 965 ["In enacting [Evidence Code] section 1108 the Legislature recognized the ' "serious and secretive nature of sex crimes and the often resulting credibility contest at trial," ' and intended in sex offense cases to relax the evidentiary restraints imposed by [Evidence Code] section 1101 'to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility' "].) Defendant does not even argue that the evidence would be barred by Evidence Code section 352, hence we find that the trial court did not err in concluding that it was "possible, if not probable," that Evidence Code section 1108 would make the evidence cross-admissible.

With respect to the second criterion, we conclude that neither rape was unusually likely to inflame the jury against defendant given that each involved similar allegations of assault and forced sexual intercourse with an acquaintance, even though one assault was more violent than the other. (See *People v. Soper* (2009) 45 Cal.4th 759, 780 [equally egregious crimes not likely to unduly inflame a jury against defendant].)

Finally, we consider whether a weak case was joined with a strong case so that the totality of the evidence could have altered the outcome as to some or all of the charges. "In order to demonstrate the potential for a prejudicial spillover effect, defendant must show an 'extreme disparity' in the strength or inflammatory character of the evidence. [Citation.]" (*Ybarra, supra*, 245 Cal.App.4th at p. 1436.) Defendant argues that the "prosecutor unquestionably used stronger evidence on the R.W. case to bolster the weaker C.L. case, but also used the C.L. case to bolster the R.W. case." Not so. The

record shows that there was not an "extreme disparity" in the strength or inflammatory nature of the evidence in the two cases, certainly as of the time the consolidation motion was heard, which is our focus in this part of the analysis. Further, as discussed above, evidence of each crime would have been cross-admissible in the trial of the other case. Hence, the risk of a prejudicial spillover effect was low.

Based upon the circumstances of this case, we find no abuse of discretion in the trial court's decision to consolidate the C.L. and R.W. matters.

C. *Due Process Contention*

As noted earlier, our inquiry does not end after finding no abuse of discretion. Instead, we must examine whether joinder of the cases actually resulted in gross unfairness that deprived defendant of due process of law. "Defendant has the burden to establish gross unfairness, a burden our Supreme Court has characterized as a 'high burden.' [Citation.] To establish gross unfairness amounting to a due process violation, a defendant must demonstrate a 'reasonable probability' that the joinder affected the jury's verdicts. [Citations.]" (*Ybarra, supra*, 245 Cal.App.4th at p. 1438.) In making this determination, "we view the case as it was tried, including a review of the evidence actually introduced in the trial." (*Id*. at p. 1434.)

Defendant concedes that "[i]n general terms the evidence presented at trial was the same as that presented at the preliminary hearing," with a few exceptions not relevant here. This is borne out by our factual recitation above. Nevertheless, defendant argues that gross unfairness resulted from (1) joining cases which both charged a "highly inflammatory" rape, and (2) joining a weak case with a stronger one. We perceive no "extreme disparity" in the strength or inflammatory character of the trial evidence in the two cases and reject these arguments for the reasons discussed earlier.

Further, the jury's deliberations and verdicts show defendant received a fair trial. Because the jurors were unable to reach a verdict on the charges involving C.L., this tends to show that no jury bias or other unfairness resulted from consolidation. (See

Ybarra, supra, 245 Cal.App.4th at p. 1440 ["In determining whether there was gross unfairness, we may also look to the verdicts here. Because the jury found defendant not guilty of two of the charges related to [one of the consolidated crimes], those verdicts tend to show that the jury considered the evidence separately and was not prejudiced by the evidence or argument related to" that incident].) And the evidence of guilt in the R.W. case, including the victim's testimony, the testimony of others regarding the severity of R.W.'s injuries, DNA evidence, and defendant's admission of sexual activity with R.W. (testifying it turned violent only after the victim purportedly drew a knife), was strong, blunting any claim that consolidation affected the verdicts reached in that case.

In sum, having reviewed the entire record, we conclude defendant has failed to show a reasonable probability that joinder affected the jury's verdicts and thus has failed to demonstrate gross unfairness.

II

Imposition of Fees, Fines, and Assessments

We next address defendant's argument that the trial court violated his right to due process by imposing fees, fines, and assessments without holding a hearing to determine his ability to pay them. This argument relies primarily on *Dueñas*, which held that "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under [ ] section 1465.8 and Government Code section 70373." (*Dueñas, supra,* 30 Cal.App.5th at p. 1164.) The *Dueñas* court also held that "although [ ] section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid*.)

The People argue defendant forfeited his *Dueñas* claim by failing to object on due process grounds or even express any concern about inability to pay in the trial court. The People further argue defendant's restitution fines are constitutional. Defendant disputes both contentions.

Defendant carries the burden to establish an inability to pay. (*People v. Kopp* (2019) 38 Cal.App.5th 47, 96, review granted Nov. 13, 2019, S257844; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154.) Here, however, defendant neither objected to the fines generally nor asserted his inability to pay them. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139 [courts presume that defendants who are capable of working and serving a lengthy prison term will be able to pay assessments from prison wages].) As a result, existing authority would hold that defendant has forfeited the issue on appeal. (*Frandsen*, at pp. 1154-1155; but see *Johnson*, at pp. 137-138 [finding defendant did not forfeit the issue on appeal]; *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [same].) There also is settled law that failing to object to the amount of a restitution fine on the ground of inability to pay forfeits that issue on appeal. (*People v. Nelson* (2011) 51 Cal.4th 198, 227; *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 [failure to object to maximum restitution fine on ground of inability to pay forfeits *Dueñas* issue].)

In any event, subsequent published authority has called the reasoning of *Dueñas* into question. As discussed in *People v. Hicks* (2019) 40 Cal.App.5th 320, review granted November 26, 2019, S258946, *Dueñas* is premised on authority involving a right under due process of access to the courts, and a bar against incarceration for an involuntary failure to pay fees or fines. (*Hicks*, at p. 325.) A postconviction imposition of fees and fines, however, does not interfere in any respect with the right of access to either the trial or appellate court. (*Id*. at p. 326.) The postconviction imposition of fees and fines also does not result in any additional incarceration, and therefore a liberty interest that due process would protect is not present. (*Ibid*.) Since the stated bases for the conclusion in *Dueñas* do not support it, the question is whether due process generally

otherwise compels the same result. (*Hicks*, at p. 327.) The People have a fundamental interest in punishing criminal conduct, as to which indigency is not a defense (otherwise, defendants with financial means would suffer discrimination). It would also be contrary to the rehabilitative purpose of probation if a court were precluded at the outset from imposing the payment of fees and fines as part of educating a defendant on obligations owed to society. (*Id*. at pp. 327-328.) "For the reasons set forth above, we conclude that due process does not [generally] speak to this issue and that *Dueñas* was wrong to conclude otherwise." (*Hicks*, at p. 329; see also *People v. Kingston* (2019) 41 Cal.App.5th 272, 279 [accord].)

Given the forfeiture of any objection and the absence of any valid claim under due process in connection with the fees, fines, and assessments, we conclude defendant is not entitled to a remand for the trial court to consider his ability to pay.

III

Our review of the record revealed the trial court only imposed a $40 court operations assessment (§ 1465.8, subd. (a)(1)) and a $30 court facilities assessment (Gov. Code, § 70373), despite defendant's convictions on five counts. These assessments are mandatory and must be imposed on a per count basis. We will modify the judgment accordingly. (*People v. Woods* (2010) 191 Cal.App.4th 269, 271-273 [failure to impose mandatory operations and facilities assessments on a per conviction basis is an unauthorized sentence and is correctable on appeal].)

Our review of the record also revealed that the trial court erroneously failed to include defendant's sentence on count 1 in the abstract of judgment. We will order the trial court to amend the abstract of judgment.

DISPOSITION

The judgment is modified to impose a $200 court operations assessment (§ 1465.8, subd. (a)(1)) and a $150 court facilities assessment (Gov. Code, § 70373). The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and

forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

KRAUSE, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.